Supreme Court, U.S.
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No. 02-846

In the Supreme Court of the United States

JOSEPH V. MAZARES, JR., AND MICHAEL R. TESTMAN,
PETITIONERS

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
SCOTT R. MCINTOSH
STEVEN ABELSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the Navy's decision to remove petitioners for refusing to obey an order to receive a mandatory vaccination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 302 F.3d 1382. The opinions (Pet. App. 16-61) and orders (Pet. App. 10-15) of the Merit Systems Protection Board are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2002. The petition for a writ of certiorari was filed on December 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Military Sealift Command (MSC) of the Department of the Navy (Navy) is responsible for

transporting the equipment, fuel, supplies, and ammunition that sustains U.S. armed forces worldwide during peacetime and war. Unlike other Navy ships, the MSC's vessels are manned by civilian mariners (CIVMARs) and civilian contractor mariners. But at the same time, MSC vessels operated by CIVMARS are under Navy administrative and operational control and operate alongside, and in direct support of, active duty Navy combat vessels around the world.

2. In 1993, the Department of Defense issued Directive 6205.3, establishing a general immunization program for biological warfare defense. Pet. App. 62-70. The directive provided that "[p]ersonnel assigned to high-threat areas" should be "immunized against validated biological warfare threat agents[] for which suitable vaccines are available." *Id.* at 64. In 1995, the military departments issued a joint instruction, Secretaries of the Air Force, Army, Navy, and Transportation, *Immunizations and Chemoprophylaxis* (Nov. 1, 1995) (*BUMEDINST 6230.15*), implementing Directive 6205.3. Pet. App. 80-87. Among other things, the joint instruction specified that "all Navy and Military Sealift Command ships (*including civilian mariners*)" are subject to immunization. *Id.* at 85 (emphasis added). The joint instruction further authorized the commanders-in-chiefs of unified commands to "establish specific immunization requirements" with respect to particular missions. *BUMEDINST 6230.15*, § 26.2.

In 1998, the Secretary of Defense approved an anthrax vaccine immunization program (AVIP). Pet. App. 71. The Secretary of the Navy has issued instructions implementing AVIP, which provide, *inter alia*, that "[f]ederal civilian employees and other groups having status equivalent to deployable forces serving under the auspices of the [Navy] are subject to the

same immunization requirements as active duty personnel." *Id.* at 88. The instructions apply AVIP to civilian employees "whose duties classify them [as] 'Mission Essential' and place them at risk for exposure to anthrax used as a biological weapon in a combat or operational setting." *Id.* at 89. The instructions further provide that civilians "who work in, or are likely to be deployed to, areas of operations identified as high risk" are subject to immunization, and that commanders are responsible for determining "which employees are at sufficient risk to warrant immunization." *Ibid.*

In October 1999, acting pursuant to the Secretary of the Navy's instructions, the Commander of the MSC issued an order providing that "[t]he basic immunization series for deployable naval forces, including anthrax, is a requirement for all MSC CIVMARs unless medically waived." Pet. App. 78.

3. In October 1999, petitioners served as CIVMARs aboard the naval ship KILAUEA, which at the time was deployed with the U.S. Pacific Seventh Fleet to provide munitions support to the aircraft carrier USS KITTY HAWK. The KILAUEA was ordered to undergo a major overhaul in South Korea. Korea has been determined by the military to be a high-risk area for biological weapons. As a result, the KILAUEA's captain, acting pursuant to the Commander of the MSC's October 1999 order, ordered anthrax immunizations for the crew, which consisted of CIVMARs. Petitioners refused the direct orders of the chiefmate and the captain to receive the anthrax vaccination, and were returned to California. Pet. App. 2-3.

In December 1999, the Navy instituted removal proceedings against petitioners for failure to obey a direct order to receive the anthrax vaccination. Petitioners claimed that their refusal to obey the vaccination order

was justified by medical reasons. The Navy cancelled the removals and investigated their claims. But after investigating the claims and conducting full administrative proceedings, the Navy concluded that neither petitioner was entitled to a medical exemption and removed both for failure to obey the vaccination order. Pet. App. 3.

4. Petitioners appealed to the Merit Systems Protection Board (MSPB). After a hearing, an administrative judge affirmed the Navy's decision of removal in both cases See Pet. App. 16-37, 38-61. The administrative judge concluded that the Commander of the MSC is authorized to implement the Navy's directives governing vaccinations and to order CIVMARs to be vaccinated against anthrax upon entering a designated high-threat area, and that the KILAUEA's captain was therefore authorized to order petitioners to receive the anthrax vaccination before their deployment to South Korea. *Id.* at 21-22, 44-45. The full MSPB denied petitioners' requests for review. *Id.* at 10-11, 13-14.

5. The court of appeals affirmed. Pet. App. 1-9. The court rejected petitioners' argument, based on a March 30, 1999, memorandum issued by the Assistant Secretary of Defense for Health Affairs, that the order requiring petitioners to be vaccinated against anthrax was not authorized. The court recognized that the March 30, 1999, memorandum stated a "general policy" with respect to administering the anthrax vaccine to military and civilian personnel, and that the memorandum was not applicable to "non-'emergency essential' civilian employees," such as petitioners. *Id.* at 6. But the court concluded that the March 30, 1999, memorandum did not "either explicitly or by necessary implication, *prohibit* anthrax vaccination of such civilian

employees, *i.e.*, those who are not designated 'emergency essential.'" *Ibid.* (emphasis added).

The court further recognized that "[t]he military has broad authority and discretion in dealing with its personnel, both military and civilian, including the protection of their health." Pet. App. 7. In addition, the court continued, "[t]here is ample authority in the appropriate Navy regulations and directives for the Navy to require all civilian employees, including those not designated 'emergency essential,' to receive anthrax vaccine when the Navy determines that such action is necessary and appropriate to protect the health of such employees." *Id.* at 6. After reviewing those authorities (discussed above), the court held that "[t]he Navy did not exceed its authority or otherwise abuse its discretion by ordering [petitioners] to undergo anthrax vaccination" in light of the fact that they were deployed to a high-threat area for biological warfare. *Ibid.*

ARGUMENT

The court of appeals correctly concluded that the Navy had authority to remove petitioners when they refused to undergo vaccination for anthrax before their deployment to an area where the military has determined there to be a high threat for biological attack. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. The Secretary of the Navy is vested by statute with "the authority necessary to conduct[] all affairs of the Department of the Navy." 10 U.S.C. 5013(b). In conjunction with that general statutory authority, the Navy (along with other federal agencies) is specifically empowered by regulation to "establish periodic exami-

nation or immunization programs by written policies or directives to safeguard the health of employees whose work may subject them or others to significant health or safety risks due to occupational or environmental exposure or demands." 5 C.F.R. 339.205. That statutory and regulatory power gives the Navy ample authority to require CIVMARs deployed to areas in which there is a high threat of biological attack to undergo immunizations to protect them from biological threats that could harm or kill them and thus disrupt the military missions in which they are engaged.

In particular, *BUMEDINST 6230.15* has provided since 1995 that civilian employees "having status equivalent to deployable forces * * * are subject to the same immunization requirements as active duty personnel," and that CIVMARs serving on Navy and Military Sealift Command vessels deployed to any foreign country except Canada constitute part of the Navy's "alert forces" for immunization purposes. Pet. App. 85, 86.[1] The Secretary of the Navy's 1998 directive regarding anthrax immunization reiterates that civilian employees with a status equivalent to deployable forces are subject to the same immunization requirements as active duty personnel. *Id.* at 88. It

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[1] Petitioners assert (Pet. 10) that *BUMEDINST 6230.15* does not specifically include anthrax in its list of prescribed immunizations. But the scope of the directive was specifically modified in April 1998 to cover anthrax. See Bureau of Medicine & Surgery, Dep't of the Navy, *Immunization Requirements and Recommendations* § 6(a)(1) (Apr. 20, 1998). Moreover, as noted above, *BUMEDINST 6230.15* itself authorizes commanders-in-chief of unified commands to establish immunization requirements that are "at variance with normal service immunization policies for personnel entering their area of responsibility to participate in exercises or other operational missions." *Id.* § 26.2.

further provides that civilian employees "who work in, or are likely to be deployed to, areas of operation identified as high risk" should be immunized against anthrax, and that commanders may determine "which employees are at sufficient risk to warrant immunization." *Id.* at 89.[2]

At the time that petitioners were ordered to take the anthrax vaccination, their vessel was scheduled to be deployed to South Korea, which had been designated as a high-threat area for biological weapons. It is undisputed that active duty forces serving in the Korean theater of operations were subject to mandatory anthrax innoculation, and the 1995 and 1998 directives make clear that CIVMARs serving in high-threat areas are subject to the same immunization rules as active duty forces. The Commander of the MSC's October 1999 directive regarding anthrax immunization of CIVMARs and the individual immunization orders given to petitioners are based on and fully supported by those directives.

b. The Federal Circuit properly rejected the argument (Pet. 7-8) that the Navy was barred by a March 30, 1999, memorandum from requiring CIVMARs in high-threat areas to undergo anthrax vaccination. The memorandum was issued by the Assistant Secretary of Defense for Health Affairs to announce the adoption of

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[2] Petitioners argue (Pet. 14) that the Navy's 1998 directive authorizes anthrax immunization only for "those employees * * * whose duties classify them [as] 'Mission Essential.'" Pet. App. 89. But the directive is not confined to such employees and, indeed, expressly provides for immunization of all employees "who work in, or are likely to be deployed to, areas of operations identified as high risk." *Ibid.* So too, the 1998 direction vests commanders with the authority to determine which individual employees "are at sufficient risk" to warrant immunization. *Ibid.*

a policy requiring anthrax immunization for personnel serving in Southwest Asia and the Korean peninsula "for any period of time." Pet. App. 74. The memorandum states that "[n]either this policy nor the requirement to participate in AVIP is applicable to civilian employees or contractor personnel who are not designated as emergency essential." *Ibid.* But the memorandum in no way purports to prohibit commanders from requiring particular classes of civilian employees, such as CIVMARS, to undergo anthrax vaccination in response to specific operational requirements.

As the Federal Circuit recognized, the memorandum merely sets forth a general policy and leaves the military services discretion to depart from that policy if they determine that particular circumstances or missions require a different approach. Pet. App. 6; see *Brehmer* v. *FAA*, 294 F.3d 1344, 1348 (Fed. Cir. 2002) (a policy "indicates the standards an agency generally will follow in conducting its operations," but is not "a black letter rule that the agency is required to follow in all cases without regard to the circumstances of the particular situation before it").

Petitioners argue (Pet. 11-12) that while the policy announced in the memorandum may not have been binding on the Department of Defense, it nonetheless bound the Navy as a component of the Department. That is incorrect. As explained, at the time that the March 30, 1999, memorandum was issued, existing directives expressly permitted commanders to establish immunization requirements "at variance with normal service immunization policies for personnel entering their area of responsibility to participate in exercises or other operational missions." *BUMEDINST 6230.15*, § 26.2. Nothing in the March 30, 1999, memorandum suggests that it was intended to impose a categorical

rule that precluded military departments from using pre-existing immunization authority to deal with particularized operational needs, much less to divest commanders of settled authority to respond to high-risk threats of biological attack in areas such as Korea.

Petitioners' interpretation of the memorandum also leads to an absurd result. Under petitioners' reading, the Navy was *prohibited* from requiring vaccination for one group of employees (CIVMARs) entering a high-threat area, but was *required* to vaccinate another group of employees ("emergency essential" employees) who were entering the same high-threat area. The court of appeals and MSPB correctly reasoned instead that the Department of Defense's and Navy's policies and directives on mandatory immunizations left the Navy discretion to require anthrax immunization on a basis that met the Navy's operational requirements and that ensured equal treatment to employees facing the same biological threats.

2. The March 30, 1999, memorandum on which petitioners rely has been superseded by new directives regarding the scope of the anthrax vaccination program. The new directives underscore that CIVMARs are not exempt from compulsory anthrax vaccination, and further undercut any need for review in this case.

In June 2002, the Deputy Secretary of Defense issued a memorandum reintroducing the anthrax vaccination program and modifying the general contours of the program.[3] The June 2002 memorandum states that "[t]he scope of the AVIP shall encompass personnel assigned to or deployed for more than 15 days in higher

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[3] Deputy Secretary of Defense, *Reintroduction of the Anthrax Vaccine Immunization Program* (June 28, 2002) <http://www.anthrax.mil/media/pdf/resumptionpolicy.pdf>.

threat areas whose performance is essential for certain mission critical capabilities." The memorandum also directs the Under Secretary of Defense for Personnel and Readiness, who is senior to the Assistant Secretary of Defense for Health Affairs, to "issue policy guidance on the medical and administrative aspects of the AVIP."

In August 2002, acting pursuant to the Deputy Secretary's directive, the Under Secretary of Defense for Personnel and Readiness issued a memorandum providing guidance on the "applicability and scope" of the program.[4] The Under Secretary's memorandum provides, *inter alia*, that the current anthrax vaccination policy applies to "personnel categorized as alert forces, as defined in the joint regulation on Immunizations and Chemoprophylaxis" (*BUMEDINST 6230.15*). That directive, in turn, explicitly includes CIVMARs in its definition of "alert forces." Pet. App. 85. Accordingly, the Department's current anthrax vaccination directives subject CIVMARs to mandatory vaccination on the same terms as other military personnel serving in high-threat areas.

The Federal Circuit properly upheld the Navy's decision to remove petitioners. But in any event, there is no reason for this Court to grant plenary review of the Federal Circuit's construction of a policy memorandum that is no longer in effect and that has no bearing on the Navy's current vaccination policy.

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[4] Under Secretary of Defense for Personnel and Readiness, *Policy on Administrative Issues Related to the Anthrax Vaccine Immunization Program* (Aug. 6, 2002) <http://www.anthrax.mil/media/pdf/AdminiIssues.pdf>.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
SCOTT R. MCINTOSH
STEVEN ABELSON
Attorneys

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